FILE COPY
No. 433

Clerk - Supreme Court
FILED
DEC 19 1947
CHARLES ELMORE CROPLEY
CLERK

In the

Supreme Court of the United States

OCTOBER TERM, 1947

ALFRED SHYMAN, doing business under the assumed name, business and style of ALASKA DISTRIBUTORS COMPANY,
Petitioner,

vs.

PHILIP B. FLEMING, Temporary Controls Administrator,
Respondent.

PETITIONER'S REPLY BRIEF

DANIEL B. TREFETHEN,
Attorney for Petitioner.
1466 Dexter Horton Building,
Seattle 4, Washington.

THE ARGUS PRESS, SEATTLE

No. 433

In the Supreme Court of the United States

OCTOBER TERM, 1947

ALFRED SHYMAN, doing business under the assumed name, business and style of ALASKA DISTRIBUTORS COMPANY,
Petitioner,

vs.

PHILIP B. FLEMING, Temporary Controls Administrator,
Respondent.

PETITIONER'S REPLY BRIEF

DANIEL B. TREFETHEN,
Attorney for Petitioner.
1466 Dexter Horton Building,
Seattle 4, Washington.

THE ARGUS PRESS, SEATTLE

INDEX

Page

Reply Argument 1
Prayer 15

TABLE OF CASES

Anchorage Grocery Co., In re, Opinion on Order Denying Protest, Docket No. 1288-2-P., April 6, 1945. 3 Opinions and Decisions of Administrator, 3 O.P.A. Service, pp. 156-157..... 6
Bowles v. Seminole Rock Co., 325 U.S. 410, 417.... 13
Fleming v Van der Loo, 160 F.(2d) 911-913.....14
Otto Kraft & Sons, In re, Opinion on Order Denying Protest, Docket No. 1288-3-P., May 12, 1945. 3 Opinions and Decisions of the Administrator, 3 O.P.A. Service, pp. 223-224..... 6
U. S. v. Lutz (C.C.A. 3) 143 F.(2d) 985, 989..... 11

STATUTES AND REGULATIONS

Emergency Price Control Act of 1942 (50 U.S. C.A. 901, *et seq.* §1(a).....2, 7, 13
§2(a) 2
§4(a) 2
Maximum Price Regulation 194 (7 F.R. 5909)..5, 6, 7
Amendment 10 6
Maximum Price Regulation 445.....10, 12
Second Revised Maximum Export Price Regulation (8 F.R. 4132).....2, 4, 6, 7, 12
Third Revised Maximum Export Price Regulation 10
Revised Procedural Regulation 1 (7 F.R. 8961)..9, 11



In the

Supreme Court of the United States

OCTOBER TERM, 1947

ALFRED SHYMAN, doing business under the assumed name, business and style of ALASKA DISTRIBUTORS COMPANY, *Petitioner*, vs. PHILIP B. FLEMING, Temporary Controls Administrator, *Respondent.*	No. 433

PETITIONER'S REPLY BRIEF

REPLY ARGUMENT

In reply to the factual statements and arguments presented by Respondent in this case, this Petitioner will endeavor to follow Respondent's presentation of its case, by specific reference to pages of Respondent's Brief. Respondent has in no way adverted to any of the legal authorities presented by Petitioner, but apparently has merely reiterated the arguments made by Respondent in the Answering Brief before the Ninth Circuit Court of Appeals.

The first twelve (12) pages of Respondent's Brief reiterates what Respondent contends are pertinent sections of the Statute, Regulations of the Administrator and statement of facts applicable to the case. Suitable comment thereon will be made by Petitioner in his argument hereinafter.

1. (Resp. Br., pp. 12-16) In this portion of its

Brief, Respondent attempts to demonstrate that because Petitioner had an office for the transaction of business in Seattle, Washington, and that the liquor shipments destined for Alaska had to pass through Seattle, Petitioner thereby was constituted a seller in the "Continental United States to purchasers outside of the Continental United States," and that his sales to Alaska buyers "were export sales within the definition of that term as used in the Second Revised Maximum Export Price Regulation." (Sec. 11a, 2nd Rev. Max. Ex. Pr. Regulation (8 F.R. 4132)) Respondent quotes the decision of the District Court as affirming that principle.

In answer thereto may we advert to the basic law establishing the Office of Price Administration. A reference to the Emergency Price Control Act of 1942 (50 U.S.C.A. 901 *et seq*) shows that "it is in the interest of the national defense and security and necessary to the effective prosecution of the present war, and to prevent speculative, unwarranted and abnormal increases in prices * * * and other disruptive practices resulting from *abnormal market conditions*" (Sec. 1 (a)). "Whenever in the judgment of the Price Administrator * * * the *prices of a commodity* have risen * * * in a manner inconsistent with the purposes of this Act he may by regulation or order *establish such maximum prices* * * * as will effectuate the purposes of the Act" (Sec. 2(a)). "It shall be unlawful for any person to *sell or deliver any commodity* * * * in violation of any regulation or order under Section 2 * * *" (Sec. 4(a)).

It will thus be noted that the sole purpose of the Act is to *control prices to prevent "abnormal market conditions" where the "sale and delivery" of commodities take place.*

It should be further noted that there is nothing in the Act which authorizes or empowers the Administrator to designate by a regulation, order, interpretation, or opinion, where a merchant vendor shall carry on his business nor how such merchant vendor shall operate such business. The Administrator's sole responsibility is to control the prices of goods *sold and delivered* by such merchant vendor at the *market of such sale* so that there may not be an *"abnormal market condition."*

All parties to this case agree that the *"market"* for the sales of the 6869 cases of Tom Burns whiskey was Alaska. It is likewise agreed from the time the the commodity left Minneapolis, Minnesota, until it reached its destination in Alaska no other market than sales to *buyers* in Alaska was ever contemplated or effectuated (Pre-Trial Order (R. 39-43)).

> Likewise it was agreed that "4. *Defendant's business since 1940 has been solely and wholly the distribution, sale, and delivery at wholesale to persons doing business in the Territory of Alaska, and in no other state or territory of the United States, of liquors and liquor products to retail dealers resident and doing business in different cities and towns throughout the entire in the Territory of Alaska.* * * *"
>
> "9. *None of the 'Tom Burns' whiskey here involved* was consumed or used in the State of Washington, nor *sold to anyone for use in the State of Washington.*"

> "H. *At no time between the dates of March 25, 1943, and October 1, 1943, was there any maximum price for the sales of 'Tom Burns' whiskey in the Territory of Alaska.* * * *"

Thus, Petitioner contends that under the basic law he is not questioning the validity of the 2nd Revised Maximum Export Price Regulation, but merely the *oral* applicability of that regulation to the facts of this case by a Seattle representative of the Price Administrator.

In this connection, Petitioner cited that *the oral designation* by the Price Attorney of the sale by K. & L. Distributors to Petitioner as being a "domestic" sale in Seattle was contrary to the law of the State of Washington (Pet. Br. 39-49). Counsel for the Re-Respondent concedes (Resp. Br. 15-16) that under the Commerce Clause this whiskey was being transshipped through the State of Washington to Alaska, and that "The sales of the liquor in question by K. & L. Distributors to Petitioner were specified to be 'For export to Alaska only.'" That concession, in itself, demonstrates that Alaska was always the contemplated market for this particular whiskey, and the unapplicability to Petitioner of the *oral* interpretation made by the Administrator's representative. If such representative had rendered a *written* order, opinion, or interpretation, as to applicability of the Regulation to this case, there would have been presented a much different question for determination by this Court. But the "*oral*" designation of the sale being a "domestic" sale in the State of Washington—where such domestic sale cannot be made—surely is not to be up-

held by this Court; particularly, when such "*oral*" interpretation is contrary to the opinions of every other court than the lower court in this case.

2. Respondent argues (Resp. Br., pp. 16-17) that Maximum Price Regulation 194 has no applicability to the present case because that Regulation contains a clause set forth therein that

> "Export sales from a seller in the Continental United States to a purchaser in Alaska shall be governed by the maximum prices established for export sales by the Revised Maximum Export Price Regulation." * * * "But the obvious purpose of Sec. 1418-61 was to make Maximum Price Regulation 194 the only regulation applicable to those sales in Alaska which were covered by it." Resp. Br. 16-17 and footnote 4).

Petitioner has quite fully set forth the facts, and the law appertaining thereto, in his Brief (Pet. Br. 19-21, 89-94). May we, however, advert to Respondent's own recital of his claimed applicable sections of Regulation 194 (Resp. Br. 8) Section 1418.63 Definitions (5) was a part of the *original* M.P.R. 194 (7 F.R. 5909) which was promulgated by the Administrator *on July 29, 1942* (Such section is quoted in the previous paragraph herein).

> "In the fall of 1942 a comprehensive review of all existing price regulations was undertaken. As a result the Administrator concluded that freeze prices should, wherever possible, be replaced by specific dollars and cents prices * * * This program was gradually carried out both in the Continental United States and in Alaska." This was the pronouncement of the Administrator himself.

In the Matter of Anchorage Grocery. Opinion on Order Denying Protest, Docket No. 1288-2-P., April 6, 1945, 3 Opinions and Decisions of the Administrator, 3 O.P.A. Service, pp. 156-157.

In the Matter of Otto Kraft & Sons, 3 O.P.A. Service, pp. 223-224.

Pursuant thereto, an Amendment to Maximum Price Regulation 194 was made *on January 15, 1943* (Shyman's Ex. S. 1, M.P.R. 194, Amendment No. 10) which provided that such Regulation should 'supercede the provisions *of all other* maximum price regulations" appertaining to sales and deliveries to a *buyer in Alaska*, "except where other price regulations provide that * * * such other regulations shall apply to Alaska."

Subsequently, *on April 5, 1943*, there was made effective *Second* Revised Maximum Export sales from Continental United States. Such *Second* Revised Maximum Export Price Regulation *made no statement* therein that *such Regulation "shall apply to Alaska."* Such *Second* revision is so materially different in its most important provisions, that it can be deemed as nothing other than a new regulation entirely sufficient in itself and superceding, as well as cancelling, the previous Revised Maximum Export Price Regulation alluded to in the original Maximum Price Regulation 194 (R. 705). Thus, in point of time, there being no mention made in such *Second* Revised Maximum Export Price Regulation of its application to Alaska, Amendment 10 of Maximum Price Regulation 194, makes the sales by Petitioner to his *buyers* in Alaska come within the terms of that Alaska regulation.

Since the "comprehensive review" of all Regula-

tions, the Amendment No. 10 to Maximum Price Regulation 194, and the promulgation of *Second* Revised Maximum Export Price Regulation all occurred within four months of each other, there can be no doubt but what the Administrator himself had in mind that Alaska was an entity in itself because of its peculiar climatic and geographical situation and that the *one* Maximum Price Regulation 194 should be applicable to all purchases by buyers in Alaska.

3. Respondent (Resp. Br. 17-18) apparently has no answer other than from its viewpoint Petitioner is challenging the validity of the "formula" method by insisting that a maximum price in Seattle for 'Tom Burns' Whiskey must have been established by a written order of the Administrator or by one of his authorized assistants.

This contention has been very completely covered by Petitioner's previous presentation. (Pet. Br. 32-39). The basic Act of 1942 (50 U.S.C.A. 901 *et seq.*, Sec. 1 (a)) stipulates that the Administrator must "establish a maximum price." The Anchorage and Kraft cases cited *supra* recited that "dollars and cents" prices at the place of delivery were necessary. Practically every case which Respondent can cite, determines that though the formula method is correct, yet such formula must be reduced to a dollars and cents price by *written order* of an authorized official before damages can be recovered against a claimed violator. A mere *oral* interpretation, even upon a witness stand, is insufficient, according to the Martini case cited by Respondent as his only authority on this point (Resp. Br. 17). What was the price in Seattle for 'Tom Burns'

Whiskey? According to Respondent's trial counsel "there is nothing in that Order"—Order No. 3, upon which Respondent relies herein—"which is a dollars and cents order, duly filed, that fixes the price—dollars and cents or otherwise—*either in Seattle or for export from Seattle*, and it is conceded by the Pre-Trial Order that *there is no price fixed in Alaska*" (R. 714; 763). *No authorized official representing Respondent ever applied any formula to the establishment of a ceiling price for 'Tom Burns' Whiskey in Seattle by any written order.* It should have been proven affirmatively in this case by the Administrator that he had issued a written order wherein properly he had ascertained and worked out the formula by applying the dollars and cents costs of freight and other expenses designated in the Order and that the resultant effect designated a dollars and cents value *for Seattle.* Admittedly, that was never done.

4. (Resp. Br. 18-21) As reiterated hereinabove, the requirement of the law is that the Administrator *must establish* a dollar and cents value of the commodity in Seattle by a *written order.* There is no duty imposed upon Petitioner to apply to the Administrator for a price in his particular case, prior to making a sale. It is true, if a price has been fixed by a written order, and a sale is made violative thereof, Petitioner's ignorance of the fixed price would not excuse his payment of the resultant damage. In that case, it may be that the rule of the cases cited by Respondent (Resp. Br. 20) would be applicable. An examination of such cases reveals that the defendant in each case relied upon estoppel as a defense and avoidance of his violation.

But the Procedural Regulation (7 F.R. 8961) cited by Respondent (Resp. Br. 8, 9, 10) specifically states that a requested interpretation "shall be applicable only with respect to the particular person to whom, and to the particular factual situation with respect to which, it is rendered." Such an interpretation is not a compliance by the Administrator of his bounden duty to establish a maximum price in Seattle by a written order under the law. His failure to perform his duty cannot be shifted to the merchant's shoulders by a statement that 'you must make a request for an interpretation.' "

Petitioner deems that his argument (Pet. Br. 50-54) has not been answered by Respondent's attempt to thrust the liability upon Petitioner because of an alleged failure to ask an official interpretation.

Such argument, moreover, has been fully answered by Petitioner in his Brief (Pet. Br. 54-87). In that connection, attention is called to the facts (Pet. Br. 83-87) wherein Petitioner as well as others in the trade applied for interpretation and were given written assurances by an authorized Price Attorney, that the "price at which acquired" was the correct basic price. It was not until August, 1943, at which time Petitioner had sold about three-fourths of his stock of 'Tom Burns' Whiskey, that a new interpretation, based upon a "maximum domestic price" theory was *orally* suggested by some of Respondent's offiicals as being the proper method of determining a basic price. But, although the "price at which acquired" theory had received written sanction, no official would put into writing any price worked out on a "Maximum

domestic price" theory. Consequently, no method of appeal to the Emergency Court of Appeal was open to Petitioner. After the commencement of the action, decisions of the Emergency Court of Appeal—as quoted in Petitioner's Brief (Pet. Br. 31-39)—determined the law to be that when it was a matter of interpretation of a Regulation and applicability of the provisions to the particular price governing a sale, the jurisdiction of the District Court was complete and there was no need to apply the "five days after judgment" rule since no question of validity was involved.

5. No reference is made by Respondent (Resp. Br. 21-25) to Petitioner's decisions and the applicability of such decisions to the facts of this case (Pet. Br. 49-87). At the bottom of page 21 of its Brief, Respondent notes that the "cost of acquisition" theory was a recognized legal method of computation of basic price, until the passage of the Third Revised Maximum Export Price Regulation, some six months after the sales had occurred in this case. Such statement merely confirms the statement of Maximum Price Regulation 445, made on May 2, 1944, where so-called over ceiling purchases had been recognized and practiced (Pet. Br. 62) under the "price at which acquired" doctrine.

It must be remembered that Petitioner was not charged with "over-ceiling purchase." There is no question as to good faith of Petitioner in following the practice existent in the Alaska trade since 1934; therefore, there was no "joyful" aiding of a seller in the violation of a law. (Resp. Br. 23). Respondent

is unfortunate in its selection of the case of *U.S. vs. Lutz*, 142 F.(2d)985, 989 (C.C.A. 3). In that case the court distinctly held that the method of oral testimony of an investigator upon the stand, testifying in the same manner as the witness Geraghty did in this case, was not competent proof of, but were conclusions as to, the so-called ceiling price; but since the opposing counsel made no objections the evidence was allowed to stand in the quoted case. Furthermore, that case is authority that in order to hold the defendant liable for "over-ceiling" purchase, he must be charged therewith. There was no charge of such nature set forth in Respondent's Complaint in this case.

Petitioner does not deem that any of the theoretical discussion of possible results of the "price at which acquired" doctrine (Resp. Br. 22-24) has any applicability to this case, since no facts nor proofs *of any kind* to support such discussion were rendered in this case. This is the first time that such theories have been advanced by any of Respondent's counsel, and since such theories were not presented to either of the lower courts in this case, they should not be considered by this Court.

Furthermore, no "official interpretation" setting *any price*—either legal or illegal—on 'Tom Burns' Whiskey *in Seattle* was ever rendered by any authorized official of the Office of Price Administration within the purview of Revised Procedural Regulation 1 (7 F.R. 8961) which Respondent quotes in its brief (Resp. B. 9, 10). This Court can take judicial knowledge of the fact that not only in all large mercantile establishments, but in every corner grocery

store and family meat market, in the United States during the war, prices of commodities were posted on each article to be sold. Those prices were officially designated by the Administrator, or his authorized assistants, in accordance with the basic Act of 1942, and were not obtained by the laborious circumlocution of having the merchant "request an interpretation" in accordance with Revised Procedural Regulation No. 1 as designated in Respondent's Brief (Resp. Br. 8, 9).

Concerning Respondent's argument (Resp. Br. 24-25) that Recent Price Interpretation No. 17—Plaintiff's Ex. 6—was available as an aid to the Court (Resp. Br. 25) may we respectfully state that no such interpretation was ever included in *Second* Revised Maximum Export Price Regulation which is the regulation under which the present action is being prosecuted (R. 699). Such Interpretation No. 17 was promulgated in an interoffice communication referring to an interpretation of the original Revised Maximum Export Price Regulation, was *not* included in the *Second* Revised Maximum Export Price Regulation—April 5, 1943 to September 30, 1943, during which period the sales in this case were made by Petitioner—and was corrected by Maximum Price Regulation 445 on September 30, 1943. Lengthy discussion of the admissibility of such interpretation was made before the District Court (R. 683-707) but neither the District Court nor the Circuit Court of Appeals apparently gave any heed to the so-called Interpretation No. 17 as an "aid" in their decisions and consequently, this Court likewise should give equally as little con-

sideration thereto. This is particularly true since *no price* on 'Tom Burns' Whiskey in Seattle had been made while Interpretation No. 17 was in force even as an inter-office "aid."

Again, counsel for Respondent chose an unfortunate decision to reinforce his argument, by citing *Bowles v. Seminole Rock Co.*, 325 U.S. 410, 417. In that case the bulletin or the "administrative construction," was "made available to manufacturers as well as to wholesalers and retailers" in a written form in a paper entitled "What Every Retailer Should Know About the Maximum Price Regulation." In the present case, however, Interpretation No. 17 was contained in an inter-office O.P.A. communication service not available in any public law library in Seattle and found only in the Office of Price Administration offices or in the private law files of some attorney connected with such Office of Price Administration. Furthermore, it should be noted that in the Seminole case, page 415(3) a definite dollars and cents price of "60 cents per ton for crushed stone" had been fixed by the Administrator's authorized official assistant.

Again, may it be reiterated that no official ceiling price in Seattle for 'Tom Burns' Whiskey has ever been established by *any* official of the Office of Price Administration in a written order.

6. (Resp. Br. 25-26) The decision of the Emergency Court of Appeals as to the applicability of Paragraph (d) Sec. 205, Act of 1942 (Pet. Br. 95-99) when Petitioner's good faith has been found by the District Court, should be upheld by this Court. The facts of the present case are exactly in line with the

facts set forth in such case of *Fleming v. Van der Loo*, 160 F.(2d)906, at 911-913. Respondent's argument (Resp. Br. 26) concerns Paragraph (e) of Section 205, Act of 1942, a different section than that referred to by the Court hereinabove quoted.

As to Respondent's footnote (Resp. Br. 26), the goods had been sold by the time Petitioner learned in August, 1943, that there was some question of over-ceiling price and therefore it was too late for Petitioner to do otherwise than he did in this case, in his attempts to ascertain what the ceiling price was (Pet. Br. 83-85) and what the law was as determined by the Emergency Court of Appeals and by other courts (Pet. Br. 67-81).

7. (Resp. Br. 27-28) In answer to Respondent's contention that "it is unnecessary to consider the merits of" Petitioner's charge that established business practices were being overturned in this case, contrary to law, may we request this Court to read again Petitioner's cases and argument thereon (Pet. Br. 106-107, 86-87). Since "applicability" of the Office of Price Administration officials rulings are in question in the present case and not the "validity" of any regulation, the "five days after judgment" law (Resp. Br. 27-28) cannot be invoked by Petitioner.

8. (Resp. Br. 28-29) Petitioner considers that his argument (Pet Br. 107-111) has in no way been refuted, or denied, by Respondent's contention. The K. & L. Distributor's case, it is claimed by Respondent, established a maximum *domestic* price in Seattle based upon Order No. 3. It was such claimed maxi-

mum *domestic* price which constituted the so-called "over-ceiling" charge in this case. The identical whiskey, and the identical over-charge, constituted the so-called basic price in the one transaction. Such single transaction—the sale by K. & L. Distributors to Shyman, or the purchase by Shyman from K. & L. Distributors—whichever way counsel may put it—is the gravamen of the two cases. The so-called "ceiling" price was based on that one transaction. Since Respondent has been paid in full by K. & L. Distributors for that one act, it seems unjust and inequitable for Respondent to collect a second time the equivalent amount of money as damages from Petitioner.

PRAYER

Petitioner respectfully submits, again, that the decision of the Ninth Circuit Court of Appeals should be reviewed and reversed by this Court.

Respectfully submitted,

Daniel B. Trefethen

DANIEL B. TREFETHEN,
Attorney for Petitioner.

December 19, 1947.